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# YTS ARCHITECTURE SDN BHD v. OXLEY GEM SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[CIVIL SUIT NO: WA-22NCVC-854-12-2020]
B 26 DECEMBER 2022

**Abstract** – *The general belief that a pleading can only be struck out on an application by the opposing party is a clear misnomer. The court, on its own motion, is duty-bound to strike out a pleading if, inter alia, the pleadings may prejudice, embarrass or delay a fair trial. If the extent of the defects in a statement of claim is such that it cannot be cured by mere amendments, the more just and economical method is for the statement of claim to be struck out with liberty to file afresh.*

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***CIVIL PROCEDURE:*** *Statement of claim – Drafting of – Non-compliance – Failure to provide necessary particulars – Whether contained inherent defects – Whether court on its own motion duty-bound to strike out pleadings that may prejudice, embarrass or delay fair trial – Rules of Court 2012, O. 18 rr. 6, 7, 12*

E ***CIVIL PROCEDURE:*** *Striking out – Pleadings – Statement of claim – Drafting of – Non-compliance – Failure to provide necessary particulars – Whether contained inherent defects – Whether court on its own motion duty-bound to strike out pleadings that may prejudice, embarrass or delay fair trial – Rules of Court 2012, O. 18 rr. 6, 7, 12*

F The plaintiff, a registered company, was appointed as a professional architect, engineer and professional electrician ('the appointment') by the defendants. The appointment of the plaintiff was accompanied by various duties and responsibilities as stated in the statement of claim ('SOC'). The plaintiff alleged that it had carried out its duties and responsibilities under G the appointment and had duly invoiced the defendants on the amount of payment due for its services. The defendants failed to honour the invoices and owed a sum of RM6,682,391.18 to the plaintiff. The plaintiff further alleged that there was a conspiracy amongst the defendants to defraud its creditors and particularised the deceit carried out by the defendants against H the creditors in the SOC. As a summing up of its claim, the plaintiff alleged that the defendant had carried out its business for the fraudulent purpose of deceiving the plaintiff by not paying the plaintiff. As a result of these grievances against the defendants, the plaintiff filed a claim for a declaration that the defendants owed a sum of money as specified in the SOC.

I **Held (striking out plaintiff's statement of claim):**

**(1)** The rule as to the drafting of the SOC is as specified in O. 18 of the Rules of Court 2012 ('ROC'). Under O. 18 r. 7(1) the operative words are that only facts but not the evidence is to be pleaded and the facts must be

brief as the nature of the case admits. More importantly, O. 18 r. 7(4) states that anything done or events which have occurred are to be implied in the SOC. In a direct contravention of this provision of the law, the plaintiff begins his SOC by giving a lengthy description from paras. 8 to 13 of the backgrounds of the projects obtained by the defendants which was of no relevance to the plaintiff's claim. (paras 9-12)

**(2)** It was only in para. 14 of the SOC that the plaintiff pleaded a material fact on which his claim was founded on *ie*, his appointment by the defendants. However, the statement in this paragraph flouted O. 18 r. 12 in not providing the necessary particulars. In this paragraph, the material particular missing was whether the plaintiff's appointment was by way of an oral appointment or a written appointment and even more glaring was the fact that the plaintiff was unsure whether it was the second or the third defendant which made the appointment. Companies being separate entities, this was a material fact to be pleaded, therefore, the plaintiff had to state specifically whether it was the second or third defendant which made the appointment, it could not be stated as 'either/or'. (paras 13 & 14)

**(3)** Paragraphs 15 to 27 of the SOC flouted O. 18 r. 7 as all these paragraphs contained evidence rather than facts to support the plaintiff's claim for non-payment on the invoices issued by the plaintiff to the defendants. The particulars of the invoices were mentioned only in para. 28 of the SOC. In paras. 33 and 35 of the SOC, the plaintiff had alleged fraud against the defendants without giving particulars as required by O. 18 r. 12. It could therefore be deduced from the above that half of the SOC of the plaintiff flouted the express provision of the law. Any intentional non-compliance of the law could not be overlooked by the court as it is a known principle in civil law that parties are bound by their pleadings. This non-compliance can embarrass and prejudice a fair trial which is a reason enough to strike out the SOC. (paras 15-18)

**(4)** The SOC also contained inherent defects which included inclusion of facts not relevant to the plaintiff's claim as well as mentions of third parties who were not even parties to this suit. The companies must be correctly described as they were separate entities, and a failure to do so was fatal. This confusion with regards to the defendant companies was prevalent in the entire SOC and it became unclear which company was involved in which project. There were a number of inherent material defects in the SOC which were reasons enough to strike out the SOC again for the reason it would prejudice and embarrass a fair trial. (paras 19, 23, 24 & 25)

**(5)** There is a general belief that a pleading can only be struck out on an application by the opposing party. This in view of the court was a clear misnomer. It is to be noticed that nowhere in O. 18 r. 19 of the ROC it is stated that the court can only strike out the pleading on an application of a party. On the converse, on the reading of the provision properly, it showed that the court on its own motion is duty-bound to strike out a pleading if the conditions to do so as specified in the provision were met and this included if the pleadings prejudice, embarrass or delay a fair trial. (paras 26 & 28)

**(6)** In addition of the above provision O. 34 gives the court wide powers for pre-trial management for a just, expeditious and economical disposal of the case. The extent of the defect in the SOC is such that it could not be cured by mere amendments to the SOC. The more just and economical method was for the SOC to be struck out with liberty to file afresh. (para 29)

**Legislation referred to:**
Rules of Court 2012, O. 18 rr. 6, 7(1), (4), 12, 19, O. 34

*For the plaintiff - M/s Nandrajog*
*For the defendants - M/s KH Lim & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Akhtar Tahir J:**

### Introduction

**[1]** In this case, the court on its own motion struck out the plaintiff's statement of claim ("SOC") for non-compliance in the drafting of the SOC as stated in the Rules of Court 2012 ("the Rules") as well as for apparent defects in the SOC itself.

### The Brief Facts

**[2]** The plaintiff is a company incorporated under the Companies Act 1965 and having addresses both in Kuala Lumpur and Kota Kinabalu. The plaintiff is also a registered company under the Board of Architects by virtue of the Architects Act 1967. The first three defendants are companies incorporated under the Companies Act 1965 whereas the fourth and fifth defendants are individuals connected to the first to third defendants.

**[3]** A sum total of plaintiff's claim is founded on the plaintiff's appointment as professional architect, engineer and professional electrician ( "the appointment") by the defendants. The appointment of the plaintiff was accompanied by various duties and responsibilities as stated in the SOC.

**[4]** The plaintiff allege that it had carried out its duties and responsibilities under the appointment and had duly invoiced the defendants on the amount of payment due for its services. The defendants failed to honour the invoices and a owed a sum of RM6,682,391.18 to the plaintiff. In the alternative, the plaintiff claimed against the defendants on a quantum merit basis for the work done and contended that the defendant had unjustly been enriched by the work carried out by the plaintiff.

**[5]** The plaintiff further alleged that there was a conspiracy amongst the defendants to defraud its creditors and particularised the deceit carried out by the defendants against the creditors in the SOC.

**[6]** As a summing up of its claim, the plaintiff alleged that the defendant had carried its business for the fraudulent purpose of deceiving the plaintiff by not paying the plaintiff.

**[7]** The plaintiff further alleged in the SOC that the fourth and fifth defendants had deceived the company commission by giving false address.

**[8]** As a result of these grievances against the defendants, the plaintiff filed claim to claim for a declaration that the defendants owed a sum of money as specified in the SOC.

## The Rules As To The Drafting Of The SOC

**[9]** The rules as to the drafting of SOC is as specified in O. 18 of the Rules. The formal requirements are stated in O. 18 r. 6 of the Rules. For the purposes of this case, the two specific provisions of the Rules relied by the court are O. 18 r. 7 and O. 18 r. 12 which for ease of reference are reproduced here in full:

> Facts, not evidence, to be pleaded (O. 18 r. 7)
>
> (1) Subject to the provisions of this rule and rules 10, 11 and 12, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.
>
> (2) Without prejudice to paragraph (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
>
> (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.
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> (4) A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

12. Particulars of pleading (O. 18 r. 12)

(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(1A) No party shall quantify any claim or counterclaim for general damages.

(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed three folios, they shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document has already been served and, if so, when, or is to be served with the pleading.

(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party:

(a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless the Court is of the opinion that there were sufficient reasons for an application by letter not having been made.

(7) The particulars requested or ordered and supplied shall be served in accordance with Form 31.

**[10]** Under O. 18 r. 7(1), the operative words are that only facts but not the evidence is to be pleaded and the facts must be brief as the nature of the case admits.

**[11]** More importantly, O. 18 r. 7(4) states that anything done or events which have occurred are to be implied in the SOC.

**[12]** In a direct contravention of this provision of the law, the plaintiff begins his SOC by giving a lengthy description from paras. 8 to 13 of the backgrounds of the projects obtained by the defendants which is of no relevance to the plaintiff's claim.

**[13]** It is only in para. 14 of SOC, the plaintiff pleads a material fact on which his claim is founded on *ie*, his appointment by the defendants. However, the statement in this paragraph flouts O. 18 r. 12 in not providing the necessary particulars.

**[14]** In this paragraph, the material particular missing is whether the plaintiff's appointment is by way of an oral appointment or a written appointment and even more glaring is the fact that the plaintiff is unsure whether it was the second or the third defendant which made the appointment. Companies being separate entities, this is a material fact to be pleaded therefore the plaintiff has to state specifically whether it was the second or third defendant which made the appointment, it cannot be stated as "either/or".

**[15]** Paragraphs 15 to 27 of the SOC flout O. 18 r. 7 as all these paragraphs contain evidence rather than facts to support the plaintiff's claim for non-payment on the invoices issued by the plaintiff to the defendants. The particulars of the invoices are mentioned only in para. 28 of the SOC.

**[16]** In paras. 33 and 35 of the SOC, the plaintiff has alleged fraud against the defendants without giving particulars as required by O. 18 r. 12.

**[17]** It can therefore be deduced from the above that half of the SOC of the plaintiff flouts the express provision of the law. Any intentional non-compliance of the law cannot be overlooked by the court as it is a known principle in civil law that parties are bound by their pleadings.

**[18]** This non-compliance can embarrass and prejudice a fair trial which is a reason enough to strike out the SOC.

**Inherent Defects In The SOC**

**[19]** In addition to the above non-compliance of the provisions of law, the SOC contains inherent defects which include inclusion of facts not relevant to the plaintiff's claim as well mentions of third parties who are not even party to this suit.

**[20]** In para. 32, the plaintiff makes a general statement and give particulars that the defendants are carrying out fraudulent trading to defraud their creditors. The identities of this creditors are not stated and these creditors are clearly not a party to this suit.

**[21]** In para. 36, alleges that the fourth and fifth defendants have deceived the Suruhanjaya Syarikat by giving false address. The Suruhanjaya Syarikat is not a party to this suit. If there is any deception, it is the Suruhanjaya Syarikat who must act against the defendants.

**[22]** A further defect in the SOC is with regards to the identity of the defendants. In para. 2, the first defendant is described as "Oxley Gem", the second defendant as "Oxley Malaysia", the third defendant as "Oxley Holdings".

**[23]** In para. 7, the plaintiff describes the fourth and fifth defendants as directors and shareholders of "Oxley Gem", "Oxley Holdings" and the third defendant. In the above description, "Oxley Holding" and third defendant are the same entities. This might be a typo error but it is fatal because the companies are separate entities and must be correctly described.

**[24]** This confusion with regards to the defendant companies is prevalent in the entire SOC and it becomes unclear which company is involved in which project.

**[25]** It can be summarised that there are a number of inherent material defects in the SOC which are reasons enough to strike out the SOC, again for the reason it will prejudice and embarrass a fair trial.

## The Court's Power To Strike Out The SOC

**[26]** There is a general belief that a pleading can only be struck out on an application by the opposing party. This in the view of the court is a clear misnomer.

**[27]** The most common provision applied to strike out a pleading is O. 18 r. 19 which is worded as follows:

> **19. Striking out pleadings and endorsements (O. 18 r. 19)**
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

**[28]** It is to be noticed that nowhere in this provision it is stated that the court can only strike out the pleading on an application of party. On the converse on the reading of the provision properly, it shows that the court on its own motion is duty-bound to strike out a pleading if the conditions to do so as specified in the provision are met and this includes if the pleadings prejudice, embarrass or delay a fair trial.

**[29]** In addition of the above provision, O. 34 gives the court wide powers for pre-trial management for a just, expeditious and economical disposal of the case. In this case, the extent of the defect in the SOC is such that it cannot be cured by mere amendments to the SOC. The more just and economical method is for the SOC be struck out with a liberty to file afresh.

## Conclusion

**[30]** For the above reasons, the court struck out the plaintiff's SOC with no order as to cost with a liberty to file afresh.